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No. 85-5024

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IN THE
SUPREME COURT OF THE UNITED STATES

7

October Term 1984

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MICHAEL KENT POLAND, Petitioner,

11

vs.

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THE STATE OF ARIZONA, Respondent.

14

15

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA

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19

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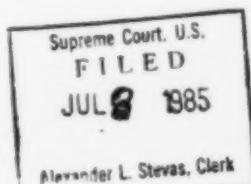
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QUESTION PRESENTED FOR REVIEW

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TABLE OF CONTENTS

4

	<u>Page</u>
5 QUESTION PRESENTED	i
6 TABLE OF CASES AND AUTHORITIES	iii
7 OPINION BELOW	1
8 JURISDICTION	1
9 CONSTITUTIONAL PROVISIONS INVOLVED	2
10 STATEMENT OF THE CASE	2
11 ARGUMENT	5
12 CONCLUSION	8
13 AFFIDAVIT OF SERVICE	9
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
29	
30	
31	-iii-
32	

1

2

3 TABLE OF CASES AND AUTHORITIES

4	<u>Case</u>	<u>Page</u>
5	Arizona v. Rumsey U.S. 104, S.Ct. 2305, 81 L.Ed.2d 164 (1984)	6,7
7	Bullington v. Missouri 451 U.S. 430 (1981)	4,6,7
9	Burks v. United States 437 U.S. 1 (1978)	7
10	Green v. Massey 437 U.S. 19 (1978)	7
12	Jones v. Thigpen 741 F.2nd 805 (5th cir. 1984)	7
14	State v. Poland 645 P.2nd 801 (1981)	3
16	State v. Michael Kent Poland 698 P.2nd 207 (1985)	1
17	State v. Patrick Gene Poland 698 P.2nd 183 (1985)	1,2
19	State v. Jordon 614 P.2nd 825	5
21	State v. Watson 586 P.2nd 1253 (1978)	2,3
22	Young v. Kemp 760 F.2nd 1097 (11th cir. 1985)	7,8
24	<u>Constitutional Provisions</u>	
25	United States Constitution Fifth Amendment	1
27	<u>Arizona Statutes</u>	
28	Arizona Revised Statutes §13-453	2,5
30	Arizona Revised Statutes §13-454	2,3,5,6
31		
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5 IN THE
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7 SUPREME COURT OF THE UNITED STATES
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9 October Term 1984
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11 MICHAEL KENT POLAND, Petitioner,
12

13 VS.
14

15 THE STATE OF ARIZONA, Respondent.
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17 PETITION FOR WRIT OF CERTIORARI TO
18 THE SUPREME COURT OF ARIZONA
19

20 OPINION BELOW
21

22 A copy of the opinion of the Supreme Court of Arizona
23 in the petitioner's case is attached as Appendix I and a copy of the
24 opinion entered in the case of State of Arizona v. Patrick Poland,
25 which is incorporated by reference in petitioner's opinion is at-
26 tached as Appendix II. The opinion of the Arizona Supreme Court
27 affirming petitioner's conviction may be found at 698 P.2nd 207
28 (1985), which incorporates by reference the opinion affirming the
29 petitioner's brothers' conviction, which may be found in 698 P.2nd
30 183 (1985). A copy of the order of the Supreme Court of Arizona
31 denying reconsideration rehearing is attached as Appendix III.
32

33 JURISDICTION
34

35 The judgment of the Supreme Court of Arizona was enter-
36 ed on March 20, 1985, a timely motion for rehearing was denied on
37 May 7, 1985. This courts jurisdiction is invoked under 28 U.S.C.
38 §1257(3).
39

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution states:

4 "No person shall be held to answer
5 for a capital, or otherwise infamous
6 crime, unless on a presentment or in-
7 dictment of a Grand Jury, except in
8 cases arising in the land or naval
9 forces, or in the Militia, when in
10 actual service in time of War or
11 public danger; nor shall any person
12 be subject for the same offence to
13 be twice put in jeopardy of life or
limb; nor shall be compelled in any
criminal case to be a witness against
himself, nor be deprived of life,
liberty or property, without due
process of law; nor shall private
property be taken for public use,
without just compensation."

STATEMENT OF THE CASE

16 The petitioner and his brother, PATRICK GENE POLAND,
17 were jointly tried and found guilty of first degree murder. The
18 law in effect at the time, A.R.S. 13-453, punishment for murder
19 provides:

20 "A. A person guilty of murder in
21 the first degree shall suffer death or
22 imprisonment in the State Prison for
23 life, without possibility of parole
24 until completion of the service of
25 twenty-five (25) calendar years in
 the State prison as determined by and
 in accordance with the procedure pro-
 vided in §13-454."

26 A.R.S. 13-454, a copy of which is set forth in Appendix
27 IV. provides for a separate hearing before the judge for the pur-
28 pose of determining whether to impose a death penalty or a life
29 sentence without possibility of parole. In determining whether to
30 impose a sentence of death or life imprisonment, the court shall
31 take into account statutory aggravating circumstances as en-
32umerated in subsection E. In accord with State v. Watson, 586

1 P.2nd 1253 (1978), the petitioner was entitled to present any evi-
2 dence in mitigation at the time of sentencing. The State filed its
3 memorandum seeking the death penalty based upon 13-454(E)(5), the
4 defendant committed the offense as consideration for receipt, or in
5 expectation of the receipt of anything of pecuniary value and 13-
6 454(E)(6), the defendant committed the offense in an especially
7 heinous, cruel or depraved manner. (Appendix V)

8
9 The court by its special verdict, dated April 9, 1980,
10 (Appendix VI) found none of the aggravating circumstances present
11 except that the offense was committed in an especially heinous,
12 cruel or depraved manner. With regard to mitigating circumstances,
13 the court found none of the statutory mitigating circumstances pre-
14 sent. The court did find the petitioner's previous reputation for
15 good character as a mitigating circumstance and that the close
16 family ties that existed between the petitioners and their family
17 and their children as mitigating circumstance. (Appendix VI) The
18 court in imposing the death penalty found that one aggravating cir-
19 cumstance exists and there are no mitigating circumstances suffi-
20 cient to call for leniency. (Appendix VII)

21
22 On joint appeal the petitioner raised issues relating
23 to the guilt phase of the trial and in addition raised the issue as
24 to the finding of the especially heinous, cruel and depraved. The
25 State of Arizona did not cross appeal. The opinion of the State v.
26 Poland is reported in 645 P.2nd 801 (1981), a copy of the opinion
27 is attached as Appendix VIII. The Supreme Court of the State of
28 Arizona reversed the petitioner's conviction on the guilt phase of
29 the trial because of procedural error. The court went on to find:
30
31

32 "We do not believe it has been shown

beyond a reasonable doubt that the murders were committed in an "especially heinous, cruel or depraved manner."
(Appendix VIII, page 28)

The Arizona Supreme Court further stated:

"It was not until after the trial in this case that we held, in State v. Clark, *supra*, that A.R.S. §13-454(E) (5), was not limited to "murder for hire" situations, but may be found where any expectation of financial gain was a cause for the murder. Upon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance." (Appendix VIII, pages 28 and 29)

Upon retrial the petitioner and his brother, PATRICK GENE POLAND, were again found guilty of first degree murder during the guilt phase of trial. The prosecution filed a notice of intent to seek the death sentence based upon Arizona Revised Statutes §13-454(E)(5), the defendant committed the offence as consideration for the receipt or in the expectation of the receipt of anything of pecuniary value and Arizona Revised Statutes §13-453(E)(6), the defendant committed the offence in an especially heinous, cruel or depraved manner. (Appendix IX)

27 The trial court by its special written verdict, dated February 3,
28 1983, found two aggravating circumstances. That the murders were
29 intentionally and premeditatedly committed solely for financial
30 motive and the murders were especially heinous, cruel and depraved.
31 This time the court found the petitioner's previous reputation for
32

1 good character is not a mitigating circumstance for the reputations
2 were false. (Appendix XI) The petitioner was again sentenced to
3 death on February 3, 1983. (Appendix XII)

Upon appeal the petitioner's conviction on the guilt phase of the trial was affirmed by a unanimous court. The sentencing portion of the trial was affirmed by majority of three members of the Supreme Court of Arizona, with two members thereof dissenting. Petitioner filed a timely motion for reconsideration which was denied by a majority of three members of the Supreme Court of Arizona.

ARGUMENT

14 THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRE-
15 VENTS THE STATE OF ARIZONA FROM IMPOSING THE DEATH PENALTY ON THE
16 PETITIONER FOLLOWING RETRIAL.

17 Arizona law A.R.S. §13-453, provides for two possible
18 sentences for a defendant that committed a capital murder:

25 In order for the trial court to impose the death penalty
26 it must find beyond a reasonable doubt, (State v. Jordon, 614 P.2nd
27 825, cert. denied 449 U.S. 986 (1980)), that at least one aggravat-
28 ing circumstance enumerated in subsection A.R.S. §13-454(E)
29 exists and that there are no mitigating circumstances sufficient to
30 call for leniency. (A.R.S. §13-454(D) See Appendix IV)

Following first sentencing trial the court found one

¹ aggravating circumstance. A.R.S. §13-454(E)(6). (See Appendix IV)

"The defendant committed the offense in an especially heinous, cruel or depraved manner."
(Appendix VI, Special Verdict, dated April 9, 1980.)

6 The court imposed the death penalty (Appendix VII,
7 Judgment and Sentence dated April 9, 1980). Upon appeal the Sup-
8 reme Court of Arizona found in regard to the aggravating circum-
9 stance:

10 "We do not believe it has been
11 shown beyond a reasonable doubt
12 that the murders were committed
13 in an "especially heinous, cruel
14 or depraved manner." (Appendix
VII, page 28, Opinion of the
Supreme Court dated April 13,
1982 or 645 P.2nd 784, 800 (1982)).

15 The three member majority on the second appeal explain-
16 ed its previous ruling as:

17 "Our holding in Poland I, however,
18 was simply that the death penalty
19 could not be based solely upon this
20 aggravating circumstance because
21 there was insufficient evidence to
support it." (Appendix II, Opinion
dated March 20, 1985, page 31 or
698 P.2nd 183, 199 (1985).)

The petitioner posits that the Supreme Court of Arizona by its opinion of the petitioner's first trial has through double jeopardy acquitted him of the death penalty. In Bullington v. Missouri, 451 U.S. 430 (1981), this court held that double jeopardy principles apply to the sentencing phase of Missouri's bifurcated death penalty system. Likewise, this court has previously held that Arizona's death penalty sentencing procedure is a separate trial invoking double jeopardy protection. Arizona v. Rumsey,

The only distinguishing factor from *Bullington v. Missouri* is the

1 petitioner received a death penalty at both trials. Whereas,
2 Bullington received life following his first trial and death follow-
3 ing his second trial. The distinguishing factor from Arizona v.
4 Rumsey, is petitioner was granted a new trial on the guilt phase,
5 but is identical on the sentencing trial in that the sole aggra-
6 vating circumstance exposing the petitioner to the death penalty
7 was struck by the trial court at his first trial, but was found
8 proven at his second trial. Since under Bullington v. Missouri,
9 supra, and Arizona v. Rumsey, supra, double jeopardy applies to the
10 sentencing phase of the bifurcated death penalty system, therefore,
11 a ruling by the Arizona Supreme Court on the first appeal finding
12 insufficient evidence, thereby precludes a second trial on the
13 death penalty issue, in that the double jeopardy clause precludes
14 a second trial once the reviewing court has found the evidence
15 legally insufficient. (Burks v. United States, 437 U.S. 1 (1978)).
16 Green v. Massey, 437 U.S. 19 (1978), (Applying Burks to the States)
17

18 The petitioner's position is not without authority with-
19 in the Federal circuit's courts. The fifth circuit has applied
20 this principle in preventing the State from seeking a second chance
21 to impose the death penalty. Jones v. Thigpen, 741 F.2nd 805,
22 (5th cir. 1984), cert. pending. (Thigpen v. Jones, No. 84-1237,
23 filed January 14, 1985.) In Young v. Kemp, 760 F.2nd 1097, (11th
24 cir. 1985), page 1101:

25 "We conclude that the previous
26 judgment of this court left in-
27 tact the districts court's find-
28 ing of insufficient evidence to
29 support the death penalty. That
30 being the case, the double jeopardy
31 principles announced in Burks v.
32 United States, 437 U.S. 1, 98 S.Ct.
2141, 57 L.Ed.2d 1 (1978), and

1 Bullington v. Missouri, 451 U.S.
2 430, 101 S.Ct. 1852, 68 L.Ed.2d
3 270 (1981), prevent the state
from seeking the death penalty
in Young's retrial."

4 The petitioner submits that under the posture of his
5 case and the law as it now exists, the State of Arizona may not im-
6 pose the death penalty upon petitioner following his second trial
7 because of double jeopardy.

CONCLUSION

10 The decision of the Arizona Supreme Court rejecting
11 petitioner's constitutional claim of double jeopardy is erroneous
12 and in conflict with decisions of this court. The question raised
13 is substantial as is the consequences of an erroneous judgment. To
14 prevent the forfeiture of the petitioner's life, along with his
15 federal constitutional rights, petitioner respectively requests that
16 this court grant a writ of certiorari to review the judgment of the
17 Arizona Supreme Court and remand with direction that double
18 jeopardy prevents the imposition of the death penalty.

20 DATED this 5th day of July, 1985.

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